Supreme Court No. 84197-7
Court of Appeals No. 36941-9-II
Lewis County No. 04-1-00872-1

STATE OF WASHINGTON,

Respondent,

vs.

JOSE MORALES

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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I. PROCEDURAL HISTORY

The Lewis County Prosecuting Attorney charged Jose Morales by Fourth Amended Information with Count I: Hit and Run—Injury; Count II: Vehicular Assault; and Count III: Driving Under the Influence. CP 2-3. A fourth count on that Information, Count IV: Driving While License Suspended in the First Degree was dismissed the morning of trial. CP 3, Report of Proceedings Vol. I. Mr. Morales was found guilty of each count. CP 26-29. Mr. Morales received a standard range sentence. CP 35. Mr. Morales filed a timely appeal and the Court of Appeals, Division II, affirmed his conviction in a published opinion, with one dissenting opinion, and denied his appeal in all respects. See Opinion of the Court of Appeals, attached.

II. FACTUAL HISTORY

On November 3rd, 2004, Mr. Jose Morales was involved in a traffic collision on SR 507 in Lewis County. RP Vol. I, p. 5.[1] After the collision, Mr. Morales continued without stopping to give the required information and stopped about a mile away from the collision scene on SR 507, where he was detained by William Oberg. RP Vol. II, p. 127, 154. Mr. Oberg, along with his brother Robin, had been driving southbound on SR 507 when he passed a car going the other direction that was heavily damaged

[1] The Report of Proceedings containing the 3.5 and 3.6 hearing and the jury trial begin on September 10, 2007 and are numbered as volumes I, II, and III. They are referenced in this brief as RP. Vol. I, II, and III. There are other hearing transcripts that are referenced by their date.

with the hood sticking up in front of the windshield and steam coming from the engine compartment. RP Vol. II, p. 154. There was a lone male driver. RP Vol. II, p. 156.

Upon detaining Mr. Morales, Mr. Oberg, a retired police officer, did not notice any odor of alcohol on Mr. Morales. RP Vol. II, p. 160. Eventually Trooper Thornburg arrived and immediately handcuffed Mr. Morales. RP Vol. II, p. 167.

Trooper Thornburg claimed that he smelled an "obvious" odor of intoxicants and that Mr. Morales' eyes were bloodshot and watery. RP Vol. II, p. 168-69. Thornburg asked Mr. Morales if he had been drinking and Mr. Morales said he had consumed one beer. RP Vol. II, p. 170. Thornburg arrested Mr. Morales for hit and run and searched his person incident to arrest. RP Vol. I, p. 62, Vol. II, p. 173. Thornburg found a set of keys and a Washington State ID card. RP Vol. I, p. 62. After Mr. Morales was transported from the scene by an ambulance, Thornburg searched his car and found two full beer bottles and one full beer can, as well as two empty cans. RP Vol. I, p. 62, Vol. II, p. 173. Thornburg saw, prior to entering the car to search it, two beer cans on the right front seat of the car. RP Vol. I, p. 67. From his vantage point outside the car he couldn't tell if the cans were opened or closed. RP Vol. I, p. 67. Thornburg testified that Mr. Morales' car was impounded and that they do

inventory searches of impounded vehicles as a standard practice. RP Vol. II, p. 70. The impoundment occurred after the initial search of the car, which Trooper Thornburg believed to be a search incident to arrest. RP Vol. II, p. 70, 100.

Marilyn Robertson, age 67, was driving along SR 507 with her 79 year-old mother, Nancy Gunn, in a Dodge Spirit. RP Vol. II, p. 115-16, 189-90. She was driving about forty miles per hour. RP Vol. II, p. 131. The speed limit was thirty-five miles per hour. RP Vol. II, p. 119. As Ms. Robertson was coming around the curve near Big Hanaford Road, she saw Mr. Morales' car come through the stop sign at Big Hanaford Road. RP Vol. II, p. 118-19. She believed that Mr. Morales did not stop at the stop sign, but said he was driving slowly. RP Vol. II, p. 119.

Trooper Brunstad went to the scene of Mr. Morales' arrest. RP Vol. II, p. 201. He also claimed to smell an odor of intoxicants on Mr. Morales and to have noticed bloodshot and watery eyes. RP Vol. II, p. 201. At the hospital, Trooper Brunstad solicited the help of a Spanish interpreter who worked at the emergency room. RP Vol. II, p. 207. However, the State did not call the interpreter to testify at trial and never identified him. Report of Proceedings, Vol. II. As such, the court disallowed testimony from Trooper Brunstad about Mr. Morales' statements, as it was required to do under *State v. Garcia-Trujillo*, 89

Wn.App. 203, 948 P.2d 390 (1997). RP Vol. II, p. 99. Defense counsel objected to the admission of Mr. Morales' blood test because the only evidence regarding the special evidence warning was that Trooper Brunstad handed the warning to the interpreter, and listened as the interpreter spoke in a language he didn't understand. RP Vol. II, p. 207, 220, 244. The special evidence warning, which purportedly contained Mr. Morales' signature, was not offered into evidence by the State. RP Vol. II, p. 245. Trooper Brunstad does not speak Spanish and had no idea what the interpreter said to Mr. Morales. RP Vol. II, p. 220.

The court ruled that the blood test was admissible because there is no requirement whatsoever that the special evidence warning be read to a defendant under arrest for vehicular assault. RP Vol. II, p. 252-255. The blood test was admitted as exhibit 39. RP Vol. II, p. 255. The result of the test was .12. RP Vol. II, p. 255, Exhibit 39.

The Court of Appeals held that the trial court erred in holding that the special evidence warning is not required; but held the test was nevertheless admissible because: (1) The State must only prove by a preponderance of the evidence that the special evidence warning was read; (2) The State had met this burden because the defendant failed to controvert the evidence that the interpreter read something, out loud, to Mr. Morales, and Mr. Morales failed to testify that he did not understand

the words emitted by the interpreter; (3) Even assuming the warning was not read (either in whole or in part), the defendant bears the burden of showing prejudice and no such prejudice was shown because "a blood alcohol test maintains its probative value despite any variance in administering the special statutory notice," (Court's Opinion at 14, citation omitted); (4) The exclusionary rule in *State v. Turpin*, 94 Wn.2d 820, 620 P.2d 990 (1980) does not apply because *Turpin* is limited to cases where the special evidence warning is not given at all, and Mr. Morales received his special evidence warning based on Trooper Brunstad's testimony and Mr. Morales' failure to rebut the State's assertion that the unknown interpreter, whom Brunstad could not understand, read the warning to Mr. Morales in a language he could understand; and (5) Even assuming *Turpin* required exclusion of the breath test, the trial court's failure to exclude the blood test was harmless error. See Opinion of the Court of Appeals, pgs. 9-17.

Defense counsel conceded Mr. Morales' guilt on Count I, felony hit and run. RP Vol. III, p. 304. He argued the evidence was insufficient to prove vehicular assault (Count II) or DUI (Count III). RP Vol. III, p. 296-316. The jury returned verdicts of guilty on all three charges, and returned a special verdict as to the vehicular assault finding Mr. Morales was operating the motor vehicle while under the influence of intoxicating

liquor, was operating the motor vehicle in a reckless manner, and was operating the motor vehicle with disregard for the safety of others. CP 26-29.

C. ARGUMENT

I. *THE COURT OF APPEALS ERRED WHEN IT HELD THAT THE STATE HAD PROVEN THAT THE STATUTORY SPECIAL EVIDENCE WARNING UNDER RCW 46.20.308 WAS READ TO MR. MORALES.*

Mr. Morales asserted in the Court below, and reasserts here, that State failed to prove that Trooper Brunstad read the special evidence warning to him, and that as such he was not advised of his right to seek independent testing by a qualified person of his own choosing. Trooper Brunstad, despite claiming that Mr. Morales was able to understand English, sought out an interpreter at the emergency room to read the special evidence warning to Mr. Morales. (Mr. Morales, it should be emphasized, required the assistance of an interpreter at trial). However, the State failed to present the interpreter to testify at trial, and to date has offered no excuse for this failure. Nevertheless, the Court of Appeals held that Trooper Brunstad's testimony that he read the special evidence warning to this unidentified person, and that person then spoke what seemed to be Spanish to Mr. Morales (although Trooper Brunstad does not speak Spanish and had no idea what words were uttered), satisfied the

State's burden to prove that the special evidence warning was read to Mr. Morales.

a. *THE COURT OF APPEALS ERRED WHEN IT HELD THAT THE STANDARD OF PROOF FOR DETERMINING WHETHER A SUSPECT RECEIVED THE SPECIAL EVIDENCE WARNING IS PREPONDERANCE OF THE EVIDENCE.*

The Court of Appeals held that the standard for determining whether the special evidence warning was actually read to the defendant should be preponderance of the evidence. See Opinion at pg. 11. In so doing, the Court relied on two cases arising from Department of Licensing suspension actions, *O'Neill v. Dep. of Licensing,* 62 Wn.App. 112, 116, 813 P. 2d 166 (1991) and *Rockwell v. Dep. of Licensing*, 94 Wn.App. 531, 535, 972 P.2d 1276, *review denied*, 138 Wn.2d 1022 (1999). Neither of these cases dealt with the issue presented in this case, nor were they criminal law cases. Further, reliance on these non-analagous cases was unnecessary, as the answer to this question is provided by *State v. Turpin*, supra. It may be tempting to view this issue as one of first impression. After all, the inquiry is normally very simple: Was the special evidence warning read or not? Because this case is slightly different factually, however, the Court of Appeals brought needless complication to a straightforward issue. Mr. Morales argues that by failing to produce *any evidence* about the words that were actually read to Mr. Morales, beyond

Trooper Brunstad's assertion that it sounded like Spanish, the State failed to prove that the warning was read to him either actually or constructively. The rules needn't be so complicated: The government is required to administer the special evidence warning to a person under arrest for vehicular assault, and the government *must* demonstrate at trial that the warning was read. See *Turpin* at 826. Failure to do so requires suppression of the blood test. *Id.* In cases where the defendant speaks a foreign language and the government relies on an interpreter (whether certified or not) to read the special evidence warning, the government must present, at trial, testimony from the interpreter that he or she read the special evidence warning to the defendant in a language he understands. If the State fails to take this simple step, it should be viewed as a constructive failure to administer the warning. Here, the Court of Appeals erred in focusing on the subjective, namely that an unidentified person read something to Mr. Morales that sounded like Spanish to someone who speaks *no* Spanish. Applying the rule set forth in *Turpin*, as the Court of Appeals should have done, the State did not prove that the special evidence warning was read to Mr. Morales and his conviction for vehicular assault by (1) operating a motor vehicle while driving under the influence and (2) operating the vehicle in a reckless manner (upon which the State relied heavily, if not almost exclusively, on the .12 blood alcohol

result) should be reversed and he should be resentenced only for vehicular assault by disregard for the safety of others.[2] Further, his conviction for driving under the influence should be reversed and he should be granted a new trial.

b. THE COURT OF APPEALS ERR WHEN IT HELD THAT THE STATE PROVED, BY A PREPONDERANCE OF THE EVIDENCE, THAT THE SPECIAL EVIDENCE WARNING WAS READ TO MR. MORALES, AND THEREFORE STATE V. TURPIN DID NOT APPLY.

Assuming the Court of Appeals was correct in holding that the State need only prove by a preponderance of the evidence that the special evidence warning was read, the Court of Appeals erred in holding that the State met this burden. As noted by the dissenting opinion below, the State failed to call the interpreter to testify at trial, or to even identify the interpreter. Who was this "interpreter?" Did he or she possess any state certifications for interpreting Spanish? Was Spanish his or her native language? Does this person speak a regional dialect that may not be understandable to all Spanish speaking persons (i.e. Mixteco, Trice)? Did the interpreter read the warning word for word or paraphrase? Why did the State fail to produce at trial the special evidence warning form which purportedly bears Mr. Morales' signature? See RP Vol. II, p. 245. Last,

[2] Mr. Morales does not challenge the sufficiency of the evidence to prove vehicular assault by disregard for the safety of others, nor did he at the Court of Appeals.

and most importantly, why did the State fail to produce this critical witness for trial? It is quite troubling that the State has never proffered a reason for its failure to produce this witness for trial.

In excusing what can only be viewed, based on the paucity of the record, the inexcusable neglect of the State in failing to produce the interpreter for trial, the Court of Appeals instead shifted the burden of proof to Mr. Morales, holding that his failure to express confusion about the warnings satisfied the State's burden to prove the warnings were read to him in a language he understands. (See Opinion at pg. 8, "Conversely, nothing in the record suggests that the interpreter failed to translate the special statutory notice form accurately or that Morales did not understand what the interpreter read to him. This *uncontroverted* evidence is sufficient to establish that Morales received his special statutory notice[.]")

It should be noted, first, that the only way that Mr. Morales could have controverted the State's evidence on this point was to testify and present evidence, neither of which he was required to do. Mr. Morales was not asserting an affirmative defense here; he was holding to the State to its burden of proving him guilty beyond a reasonable doubt. He had no duty to controvert this evidence because RCW 46.20.308 places the burden of proving the special evidence warning was administered squarely

on the State, as does this Court's holding in *Turpin*. The State was not required to seek admission of this blood test; it *chose* to do so. RCW 46.20.308 does not provide that these tests are per se admissible unless the defendant proves (by some unknown standard of proof) that the test *should not* be admitted.

The Court of Appeals relied heavily in its opinion on Mr. Morales' failure to rebut the State's evidence that the special evidence warning was read to him. See Opinion at pgs. 8, 11, 15.[3] However, failure to rebut otherwise insufficient evidence does not make that evidence sufficient. How could Mr. Morales have known whether the special evidence warning was read to him correctly if he couldn't read it himself? If the interpreter butchered the warning, how would he know? And how, also, could Trooper Brunstad know if he doesn't speak Spanish? How can we be sure that the interpreter didn't say to Mr. Morales, "Hey, this officer has the right to make you take a blood test. If you resist, you'll just make it harder on yourself. So don't resist, okay? Just submit to the test and he'll let you go home. You won't have any problems. I promise." The evidence presented by the State just as strongly supports the inference that

[3] In its opinion, the Court of Appeals made repeated reference to Mr. Morales having signed the special evidence warning form, as though this were fact. The State did not produce this form at trial and appellate counsel has never seen it. It was not an exhibit. Nor did the State make any effort to supplement the record on appeal with this form.

the latter was said as it does that he was read the statutory special evidence warning.

The State failed to prove, even under a preponderance of the evidence standard, that the statutory special evidence warning was read to Mr. Morales. The Court of Appeals erred.

II. THE COURT OF APPEALS ERRED WHEN IT HELD THAT THE EVEN IF THE SPECIAL EVIDENCE WARNING WAS NOT READ, THE DEFENDANT MUST PROVE HE SUFFERED PREJUDICE BEFORE SUPPRESSION OF THE TEST IS REQUIRED.

The Court of Appeals, again relying on a non-criminal Department of Licensing case, held that even if the special evidence warning was not read to Mr. Morales accurately, or at all, he must nevertheless demonstrate that he suffered prejudice. Curiously, the Court then goes on to State that prejudice cannot be demonstrated, as a matter of law, because "a blood alcohol test maintains its probative value despite any variance in administering the special statutory notice." See Opinion at pg. 14. The Court of Appeals erred. Neither *State v. Turpin*, supra, nor *State v. Anderson*, 80 Wn.App. 384, 909 P.2d 945 (1996), requires the defendant to prove that he was prejudiced by admission of the blood test before the suppression remedy can be sought. *Turpin* states:

> The State cannot be allowed to use evidence which the defendant is unable to rebut because she was not apprised of her right to independent testing. Evidence obtained unlawfully is

> excluded...and the taking of Ms. Turpin's blood without informing her of her right to seek alternative testing violated RCW 46.20.308 (1). Exclusion is the appropriate remedy for violation of defendant's statutory rights.

Turpin at 826-27, internal citations omitted. Mr. Morales was not required to demonstrate prejudice, and the Court of Appeals erred.

III. THE COURT OF APPEALS ERRED WHEN IT HELD THAT EVEN IF SUPPRESSION OF THE BLOOD TEST WAS REQUIRED, THE ERRONEOUS ADMISSION OF THE BLOOD TEST WAS HARMLESS ERROR AND MR. MORALES IS THEREFORE NOT ENTITLED TO REVERSAL.

Mr. Morales urges this Court to adopt the reasoning of Judge Bridgewater, in his dissenting opinion, when he stated:

> I also disagree with the majority's holding that failure to give a special evidentiary warning is subject to harmless error analysis. Under *Turpin*, the appropriate remedy is exclusion of the blood alcohol test results. *State v. Anderson*, 80 Wn.App. 384, 388, 909 P.2d 945 (1996). The *Turpin* court reversed Turpin's conviction and remanded the case for a new trial in which the blood alcohol test would be excluded. *Turpin*, 94 Wn.2d at 827. The *Anderson* court also remanded for further proceedings. *Anderson*, 80 Wn.App. at 384; see also *State v. Holcomb*, 31 Wn.App. 398, 401, 642 P.2d 407 (1982) (holding that failure to advise defendant of his right to have additional tests performed requires reversal).

See Dissenting Opinion at pg. 29, Bridgewater, J. Mr. Morales asks this Court to hold that harmless error analysis is not available where a blood test that was obtained in violation of RCW 46.20.308 was admitted as evidence at trial. Further, the error is not harmless in Mr. Morales' case because there was not sufficient independent evidence upon which to

support his verdict of guilty for vehicular assault by driving under the influence or recklessness, or the verdict of guilty for driving under the influence. Because the blood alcohol test result was .12, which is substantially higher than the legal limit of .08, it cannot be said within reasonable probabilities that the error in admitting the blood test did not materially affect the outcome of the trial. Mr. Oberg, a retired police officer, testified that he did not detect an odor of alcohol on Mr. Morales. Mr. Morales said he had one beer, which was consistent with the Trooper's finding that there was an empty can of beer on the front passenger seat and a full one. The other car involved in this collision was speeding. No physical field sobriety tests were performed. Judge Bridgewater argued in his dissenting opinion that while the evidence tends to support a finding that Mr. Morales was under the influence, this evidence is "not so overwhelming as to overcome the erroneous admission of Morales' blood alcohol test of .12." Mr. Morales agrees and respectfully asks this Court to find that the erroneous admission of the blood test is not subject to harmless error analysis, and that even if it were the error in this particular case is not harmless.

IV. COMPARISON WITH OTHER JURISDICTIONS.

In *State v. Piddington*, 241 Wis.2d 754, 623 N.W.2d 528 (2001), a hearing impaired driver was arrested for operated a motor vehicle under

the influence and sought suppression of his breath test because the officer failed to provide a sign language interpreter. In that case, the defendant was able to read the implied consent form and communicated at length with the officer using written notes. *Id.* The Wisconsin Supreme Court held that a law enforcement officer satisfies the duty to inform accused drivers of the implied consent warnings when he or she uses "methods which are reasonable and reasonably convey those warnings under the circumstances at the time of the arrest." *Piddington* at 776. The Court went on to hold that the officer had met this burden in Mr. Piddington's case because of the ease with which he was able to communicate with Mr. Piddington despite his hearing impairment. *Id.* Mr. Morales' case is distinguishable from *Piddington* in that the defendant in *Piddington* spoke English and was able to communicate through writing; he simply couldn't hear audible sound. In Mr. Morales' case, the State presented no evidence that Mr. Morales could read English or that he was given the opportunity to read the Implied Consent form on his own. Further, in failing to produce at trial the "interpreter" who supposedly read the implied consent warning to Mr. Morales, the State failed to meet its burden of demonstrating that the officer read the implied consent warning to Mr. Morales *at all*.

The Iowa Supreme Court has adopted the reasoning of the Wisconsin Supreme Court in *Piddington* and held that the test for determining whether the implied consent warning was sufficiently administered is an objective test, based on the objective conduct of the officer. *State v. Garcia*, 756 N.W.2d 216, 222-23 (Iowa, 2008). In *Garcia*, the defendant spoke Spanish and told the officer, when she administered the *Miranda* warning, that he did not understand English. Nevertheless, the officer then read the implied consent warning to Mr. Garcia in English and made no attempt to procure an interpreter. *Garcia* at 219. When the officer asked Garcia to provide a breath sample he said "no problem," and signed the implied consent form. *Id.* He later testified that he did so because the "official" told him to sign but that he understood nothing written on the form. *Id.* The Supreme Court, however, ruled that the officer had reasonably conveyed the warning to Mr. Garcia because the officer testified that she could understand Garcia and he appeared to understand her. *Garcia* at 223. The Court found there were "numerous conversations" between the officer and Garcia with "little apparent difficulty in communicating." *Id.* The Court further opined that an officer need not take impracticable measures to convey the implied consent warning, suggesting that calling an interpreter is an impracticable measure. *Garcia* at 222. The Court stated: "The State cannot be expected

to wait indefinitely to obtain an interpreter and risk losing evidence of intoxication." *Id.* This is so even in cases, such as Mr. Garcia's, where the officer makes *no attempt* to procure an interpreter.

Although the Iowa Supreme Court claimed to endorse the standard promulgated by the Wisconsin Supreme Court, the Wisconsin Supreme Court presumably would not have reached the same result in *Garcia*. In *State v. Begicevic*, 270 Wis.2d 675, 678 N.W.2d 293 (2004), the Wisconsin Court of Appeals applied the *Piddington* rule and held that the government *failed* to meet its burden where, in the case of a German speaking defendant, it failed to even attempt to procure an interpreter. The Court found that the exigency of the dissipation of alcohol in the blood did not excuse the officer's failure to attempt to locate an interpreter. *Begicevic* at 692. This was so even where the officer testified that she was able to converse with Mr. Begicevic in English and where another officer, who spoke some German, assisted with the process. *Begicevic* at 688-89. The Court also stated, in a footnote, "It is unreasonable to assume that a driver possessing an operator's license understands the English language." *Begicevic* at 691, note 5.

Were this Court to adopt the reasoning of the Iowa Supreme Court, it would elevate form over substance and amount to a holding that so long as the officer utters the words written on the implied consent form to a

person under arrest for driving under the influence, he or she has satisfied the duty of advising a suspect of the implied consent warning.

Indeed, such was the holding of the Georgia Supreme Court. In *Rodriguez v. State*, 275 Ga. 283, 565 S.E.2d 458 (2002), the Georgia Supreme Court held that due process does not require that the implied consent warnings be given in a language that the driver understands. The Court held that the officer is required to merely recite the implied consent warning out loud in the presence of the accused without regard to whether the person to whom he is reading could possibly understand the warning. The Court offered three reasons why non-English speaking persons were simply out of luck in Georgia: First, "most people" speak English; second, requiring officers to read the implied consent warning in a language a non-English speaking person could understand would cost the State too much money; third, requiring officers to seek interpreters would be unbelievably burdensome and would cause delay in obtaining evidence of alcohol impairment. *Rodriguez* at 462.

As alarming as the *Rodriguez* holding is, it is worth noting that in Mr. Morales' case, the State would still be deemed, even under *Rodriguez*, to have failed in its burden of proving that the implied consent warning was read to Mr. Morales because the officer *did not read the warning*. He

asked some other unidentified person to do it and he has no idea whether that person actually read the warning to Mr. Morales.

D. CONCLUSION

For the reasons set forth above, Petitioner respectfully asks this Court to reverse the Court of Appeals, order suppression of the blood test evidence and grant him a new trial.

RESPECTFULLY SUBMITTED this 6th day of August, 2010.

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CERTIFICATE OF EMAILING

I certify that on 08/6/10, I emailed this document to (1) Lori Smith, Lewis County Prosecutor's Office, 345 W. Main St., Fl. 2, Chehalis, WA 98532; (2) Lisa Bausch, Clerk, Washington State Supreme Court, Temple of Justice, P.O. Box 40929, Olympia, WA 98504-0929.